No. 17-1174

IN THE

# Supreme Court of the United States

LUIS A. NIEVES, *et al.*,

*Petitioners*,

—v.—

RUSSELL P. BARTLETT,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR *AMICUS CURIAE* INSTITUTE FOR FREE SPEECH IN SUPPORT OF RESPONDENT


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## INTEREST OF *AMICUS CURIAE*[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization that exists to protect and defend the First Amendment rights of speech, press, assembly, and petition. As part of that mission, the Institute represents individuals and civil society organizations *pro bono* in cases raising First Amendment objections to the regulation of protected speech. The Institute has an interest in this case because arrests made in retaliation for the exercise of First Amendment rights are a particularly chilling form of governmental response to constitutionally protected speech disfavored by government officials. It would imperil First Amendment interests of the most significant nature if such misconduct by an agent of the government were immunized from judicial scrutiny, no matter how egregious the circumstances, whenever probable cause of a violation of law may be said to have existed.

To avoid that result and to vindicate First Amendment principles of the highest order, the Institute for Free Speech submits this brief in support of respondent Russell Bartlett and urges the court to affirm the decision below and answer the Question Presented in the negative. That an arrest effected at the discretion of an individual acting on behalf of the state was supported by probable cause

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[1] Pursuant to Sup. Ct. Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Pursuant to Sup. Ct. Rule 37.2(a), all parties have provided blanket consent to the filing of amicus curiae briefs, which the Clerk of the Court has noted on the docket.

should not, in and of itself, bar a First Amendment retaliatory arrest claim under 42 U.S.C. § 1983.

## INTRODUCTION: *MOUNT HEALTHY* AND ITS PROGENY

Earlier this year, when this Court decided a strikingly similar case concerning a claim of retaliatory arrest effected pursuant to an official municipal policy, it directed the Eleventh Circuit to analyze the claim pursuant to the framework established in *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) that it has long used to address claims of government retaliation in violation of First Amendment rights. *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1955 (2018). In *Mount Healthy*, the Court determined that to state a claim for First Amendment retaliation, a plaintiff must show that: (1) her speech was constitutionally protected; (2) she suffered adverse conduct that would likely deter a person of ordinary firmness from engaging in such speech; and (3) in part, plaintiff's constitutionally protected activity motivated defendant's adverse action. 429 U.S. at 285-287.

The *Mount Healthy* analysis often focuses on the third factor, which addresses the issue of motivation. Once the plaintiff shows that her protected conduct was a motivating factor triggering the defendant's adverse conduct, the burden shifts to the defendant to show that it would have taken the same action in the absence of the protected conduct, in which case the defendant cannot be held liable. *Id.* at 287. Defendants cann t simply contend that the adverse action was justified by circumstances other than retaliatory motive—they must show that this other

justification *actually motivated* the adverse action. Indeed, a government act taken in retaliation for the exercise of First Amendment rights is actionable under § 1983 even if the act, when taken for a different reason, might have been proper. That is what this Court held in *Mount Healthy*, and also in the recent *Lozman* case in the context of a retaliatory arrest effected pursuant to an official municipal policy. The same rule should apply when a member of the police arrests someone who would not otherwise have been arrested but for the policeman's decision to retaliate against protected speech.

To be clear, application of *Mount Healthy* in a retaliatory arrest case neither requires nor permits lower courts to ignore the issue of probable cause. Under *Mount Healthy*, a court analyzing a claim of retaliatory arrest must consider whether the arrest would have occurred absent the protected speech. The presence of probable cause is necessary to show the arrest would have occurred irrespective of the speech, but, because police officers are empowered with significant discretion in deciding who and when to arrest, its existence alone does not preclude a retaliatory arrest claim. In those circumstances where plaintiffs can demonstrate that the but-for cause of the arrest was the desire to retaliate against plaintiff's protected speech, an action under § 1983 may proceed.

In this case, petitioners urge the Court to create an exception to *Mount Healthy* in cases involving arrests at the discretion of an individual police officer or another government official. In support of their argument, they point to *Hartman v. Moore*, 547 U.S. 250 (2006), where the Court set forth, in the context of retaliatory prosecution claims, the only exception to *Mount Healthy* made to date. Under *Hartman*,

when retaliatory prosecution claims are at issue, courts must make a threshold determination that the prosecution proceeded despite the absence of probable cause for the offense. *See id.* Only after finding absence of probable cause does the court return to the *Mount Healthy*-like analysis. *Id.* at 265-66.

The *Hartman* exception, however, is only necessary to resolve the "distinct problem of causation" present in evaluating retaliatory prosecution claims that is not present in other *Mount Healthy* cases. *Id.* at 263. The causation problem there identified by this Court is that a plaintiff bringing a retaliatory prosecution claim necessarily "must show that the nonprosecuting official acted in retaliation, and must also show that he induced the prosecutor to bring charges that would not have been initiated without his urging." *Id.* at 262. By its nature, such a showing is exceedingly difficult to make because "the longstanding presumption of regularity accorded to prosecutorial decisionmaking," *id.* at 263, makes the prosecutor's mind a black box—the court may not inquire into the subjective motivation of the prosecutor who brought the charges. As a result, so long as probable cause for the prosecution exists, the underlying motivation of the state in commencing the prosecution may not be challenged without intruding into long-protected decisionmaking areas.

In cases involving retaliatory arrests, there is no such "legal obstacle," as the Court in *Hartman* put it, to deciding whether police who arrest people for any of the multitudes of potential offenses did so with the motivation of suppressing or punishing constitutionally protected speech. Indeed, this Court has previously analyzed a police officer's motivation to arrest and found it to be retaliatory. *Norwell v. City of Cincinnati, Ohio*, 414 U.S. 14, 16 (1973) (reversing

disorderly conduct conviction because the Court was "convinced that petitioner was arrested and convicted merely because he verbally and negatively protested Officer Johnson's treatment of him.").

The core legal issue in this case is thus whether this Court should create a second exception to the *Mount Healthy* standard specifically with respect to arrests. We think not. Unlike a retaliatory prosecution claim, a retaliatory arrest claim may be examined using the classic *Mount Healthy* framework because, unlike the *Hartman* situation, a court is permitted to fully examine the motivation of police officers and any other government officials involved in the decision to arrest. Just as a court can examine the motive behind an arrest effected pursuant to an official municipal policy, *see Lozman*, 138 S. Ct. at 1955, so too can it examine the motive behind other arrests. While application of *Mount Healthy* obviously does not and should not guarantee the success of a plaintiff alleging unconstitutional retaliation, application of *Hartman* assures its failure in any situation in which probable cause is held to exist. That is not a result consistent with the First Amendment.

## ARGUMENT

### I. SIGNIFICANT DEPRIVATIONS OF FIRST AMENDMENT RIGHTS WILL OCCUR IF THE EXISTENCE OF PROBABLE CAUSE FOR AN ARREST BARS ALL RETALIATORY ARREST CLAIMS UNDER ALL CIRCUMSTANCES

If this Court were to create a new exception to *Mount Healthy* which barred retaliatory arrest claims in cases in which probable cause can be demonstrated, people could be arrested in retaliation for criticizing

the police or offending them for any reason, including their expression of political views not shared by a particular police officer. In a nation awash with criminal statutes that are enforced with varying degrees of regularity—and thus often generally unenforced—it is not difficult to find probable cause to arrest. For example, the case at hand arose in Alaska, a state that regulates alcohol so strictly that it is illegal to be intoxicated inside a bar or any other establishment licensed to sell liquor. AS § 04.16.040 ("A drunken person may not knowingly enter or remain on premises licensed under this title."). This statute is routinely violated, but police retain the discretion to enforce it, and have stated to the press that they do so selectively.[2] It is not difficult to imagine a plainclothes policeman who cannot feasibly arrest every intoxicated person on the premises being drawn to target a patron loudly proclaiming political views with which the officer vehemently disagrees.

Petitioners acknowledge, as they must, that their framework "might preclude recovery for meritorious claims." Pet Br. at 48. Notwithstanding their acknowledgement of the risk, articulated by this Court in *Lozman*, that "some police officers may exploit the arrest power as a means of suppressing speech," Pet Br. at 49 (quoting *Lozman*, 138 S. Ct. at 1953),[3] they maintain that the likelihood that officers

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[2] Christina Ng, *Alaska Cops Arresting Drunks in Bars*, ABC NEWS (Jan. 10, 2012), https://abcnews.go.com/US/illegal-drunk-alaska-bars-law/story?id=15330748 (describing a 2012 effort to start enforcing this statute by plainclothes policemen, who ignored individuals they determined were only mildly intoxicated, and focused on arresting individuals they believed were extremely drunk.).

[3] This Court cited the Institute's *amicus* brief for that proposition. *Lozman*, 138 S. Ct. at 1953.

will actually suppress speech is minimal in practice, and that the speech suppressed is not terribly important. Pet Br. at 51-52. These contentions simply overlook numerous non-hypothetical scenarios memorialized in court cases and news reports. We set forth below the facts of four recent cases—one from a court of appeals and three from federal district courts—which demonstrate how outspoken people are routinely arrested in retaliation for their protected speech, and illustrate the magnitude of the speech-destructive impact of the rule sought by petitioners. Were this Court to remove a check on unlimited police discretion to arrest by imposing a bar on retaliatory arrest claims made any time probable cause of a violation of law could be said to have existed, there is no reason to expect that such cases would be infrequent.

Consider, for example, the following: on October 24, 2016, Brett Mauthe entered a polling location in New Braunfels, Texas. Mauthe was told to remove a hat bearing a Trump campaign slogan, and to turn inside out his t-shirt reading "Basket of Deplorables" to comply with an electioneering statute. Mauthe agreed to remove the hat, but declined to turn his shirt inside out. He was arrested. The county elections coordinator told the press that in her two decades working at the county election office she had never seen a potential voter arrested on such a charge. [4] Furthermore, a GOP chairman in a nearby county told the press that poll-watchers in relatively liberal San Antonio had seen voters wearing Trump shirts

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[4] John MacCormack, *Texas man arrested after wearing Trump hat, shirt to vote*, THE HOUSTON CHRONICLE (Oct. 27, 2016), https://www.chron.com/news/local/article/Electioneering-violation-leads-to-arrest-10418085.php.

told to turn them inside-out while voters wearing shirts supporting Hillary Clinton were not. *Id.*

Under the legal test urged by petitioners, even armed with evidence that a police officer patrolling a particular early-voting location had arrested all persons wearing Trump shirts who refused to turn them inside out, but let people wearing Hillary-emblazoned shirts to remain within the 100 foot radius in which electioneering is prohibited, no person arrested could state a claim for retaliatory arrest. Indeed, that would be true even if the officer had unambiguously said to the would-be Trump voters that he was arresting them because of their Trump-supporting apparel.

Any such retaliation based on the voters' political and social views would be flatly inconsistent with the core of the First Amendment. The four cases described below—three that were permitted to proceed despite the presence of probable cause and one that was not—illustrate the accuracy of this proposition.

### A. *Greene v. Barber*, 310 F.3d 889, 892 (6th Cir. 2002)

In *Greene v. Barber*, 310 F.3d 889 (6th Cir. 2002), plaintiff Anthony Greene visited the Grand Rapids Police Department to seek return of his car after it had been towed from a no-parking zone. *Id.*at 892. In a raised voice, Mr. Greene objected to paying storage fees for the period before he received notification his car was in storage. *Id.* Mr. Greene was referred to Lieutenant Jack Barber, who informed him the charge was standard procedure; Mr. Greene replied by telling the lieutenant he was "really being [an] asshole." *Id.* The following conversation transpired:

> Lt. Barber: "You can't talk to me like that in my building."
>
> Mr. Greene: "What do you mean I can't talk to you like this in your building? . I'm exercising my freedom of speech. This is the United States of America and we have freedom of speech here and if you don't like it you should move to another country."
>
> Lt. Barber: "Well, not in my building."
>
> Mr. Greene: "Well, if that's how you feel you're really stupid."
>
> Lt. Barber: "You're under arrest."

*Id.* at 892-93.

Mr. Greene was pepper sprayed and violently placed under arrest. *Id.* at 893. He was charged with creating a disturbance in violation of a local ordinance, and with hindering and opposing a police officer, for which he was ultimately acquitted. *Id.* Mr. Greene brought a civil rights action alleging, *inter alia*, retaliatory arrest in violation of his First Amendment rights. *Id.*

The Court of Appeals found that even though a "respectable argument" could be made that there was probable cause to believe that Mr. Greene was engaging in a disturbance in a public place in violation of the municipal statute, that did not foreclose a violation of Mr. Green's First Amendment rights, as a permissible act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983. *Id.* 895-96. Further, the court reasoned, Mr. Greene's words were protected speech, as they could not reasonably be expected to incite a breach of the peace, especially "by a police

officer whose sworn duty it was to uphold the law." *Id.* The court applied the *Mount Healthy* framework and held that questions of fact as to whether Lt. Barber would have taken the same action in the absence of Mr. Green's protected speech precluded dismissal of the retaliation claim on summary judgment. *Id.* at 897-98.

### B. *Gullick v. Ott*, 517 F. Supp. 2d 1063 (W.D. Wis. 2007)

In *Gullick* v. *Ott*, 517 F. Supp. 2d 1063 (W.D. Wis. 2007), Thomas Gullick sued deputy sheriff Terry Ott in his individual capacity for issuing a citation in retaliation for Ott's supporting a particular political candidate. Gullick was well-known as a supporter of town-sheriff candidate Richard Bradner, and was "disliked by supporters of" Bradner's opponent, Dennis Richards. *Id* at 1065. Ott, on the other hand, was an avid supporter of Richards. *Id.* In fact, Ott's support was so intense that even before the incident giving rise to this case, another officer had warned Gullick to "look out for" Ott. *Id.* at 1066. In the course of his warning, the officer predicted that Ott would treat Gullick unfairly were the two to ever have a dispute, because of their opposing political views. *Id.*

The interaction giving rise to the suit began when Ott saw Gullick standing on the side of the road near a sign that read: "Richards for Sheriff." *Id.* Ott pulled off to the side of the road, approached Gullick, and asked him why he was near the sign. *Id.* Gullick maintained he said that he was examining the sign to see whether it had been placed illegally on a public right of way; according to Ott, Gullick responded that he went near the sign to urinate. *Id.*

Shortly thereafter, Ott told Gullick to wait in his car while he took a look around. *Id.* Ott surveyed the area, and then contacted the sheriff's dispatch center to discuss the situation. *Id.* Ott identified Gullick to the dispatcher, and then described what he had seen. *Id.* In that description Ott noted that the "Richards for Sheriff" sign was "bent over onto the ground." Ott's supervisor visited the scene later that night and found no such damage to the sign. *Id.*

With Gullick still waiting in his car, Ott started text-message conversations with two other officers. In one of the conversations, the other officer wrote that Gullick was "a political fanatic," and that Ott should call him. *Id.* at 1067. Ott responded that he could not make the call, but that he was in search of the statute on public urination. *Id.* In the other conversation, the other officer asked whether Ott thought Gullick was the person responsible for the anti-Richards fliers that were placed around town.[5] *Id.*

After his conversation, Ott returned to Gullick, issued a citation for public urination, and asked whether he could search his car for anti-Richards fliers.[6] *Id.* Gullick consented, and Ott searched Gullick's car to no avail. *Id.* The stop lasted a little over one hour. *Id.*

In accordance with the *Mount Healthy* framework, the court analyzed the absence of probable cause as

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[5] While the stop was ongoing, Richards called his campaign manager to tell him that Gullick had been caught "peeing on a sign or bending a sign." The manager responded that "they finally caught" Gullick. *Id.*

[6] In his police report, Ott wrote that he had searched Gullick's car for anti-Richards fliers in pursuit of "evidence to support [his] case of criminal damage to a political sign." *Id.*

one factor in its larger inquiry into whether the arrest was motivated by retaliatory animus. The court found that the parties' diametrically opposing viewpoints, the ominous warning to Gullick, the infrequency with which public-urination statutes are enforced (especially in rural areas), the dispute of fact as to the absence of probable cause, and the groundless search of Gullick's car all suggested that the factor driving Ott's decision to give Gullick a citation was actually Gullick's support of Bradner. *Id.* Summary judgment was thus denied to deputy sheriff Ott.

### C. *Henneberry v. City of Newark*, 2017 WL 1493006 (N.D. Cal. April 26, 2017)

*Henneberry v. City of Newark*, 2017 WL 1493006 (N.D. Cal. April 26, 2017) concerned John Henneberry, who frequently attended City Council meetings and "actively participated in Newark politics," criticizing the salaries of City officials and their decisions to cut back public services. *Id.* at *1. Newark City officials and police officers were familiar with Mr. Henneberry because of his frequent participation at meetings, and found his criticism and use of profanity to be "hurtful." *Id.*

Mr. Hennberry saw advertisements about an upcoming State of the City address, and found further information about the event online on the "Community Events" page of the City of Newark Chamber of Commerce website. *Id.* The event description and linked flyer indicated that the event would be held at a Hilton hotel and that portions of the event, including a luncheon, required a paid ticket. *Id.* It also stated that free seating would be available for those who did not attend the lunch. *Id.* The event description and flyer did not indicate that

the event was private, nor did they indicate reservations were required to sit in the gallery seating. *Id.* Although defendants contended on summary judgment that the event was private and reservations were required, the court determined the question was "at the very least ambiguous." *Id.* at *10.

When Mr. Henneberry arrived at the State of the City address, he sat in the gallery section seating wearing a nametag he filled out at an unstaffed table. *Id.*at *2. Mr. Henneberry did not speak, but took notes on a pad of paper. *Id.*

Defendant Newark City Manager John Becker observed plaintiff was present and, worried about Plaintiff "embarrassing the Mayor," asked Newark Chamber of Commerce President Linda Ashley if there was "some reason why [Plaintiff] shouldn't be here." *Id.* Ashley responded that "we don't let anybody in who doesn't have a reservation" and "told Becker words to the effect that she would get Becker to leave because he did not have a reservation." *Id.*. Ashley approached the gallery, inquired of those seated there for the first time if they had reservations, and then informed Mr. Henneberry he needed to leave because he did not have a reservation. *Id.* at *2, *10. Mr. Henneberry declined to leave, citing a California law that requires meetings of local government bodies to be open to the public. *Id.* at *2. The Newark Police Commander and a plainclothes officer joined the discussion, and Mr. Henneberry continued to refuse to depart. Mr. Henneberry did not use inappropriate language during this confrontation, nor was he loud, confrontational, or abusive. *Id.*

Two uniformed police officers physically removed Mr. Henneberry from the event. After confirming with the police commander, Defendant Officer Fredstrom handcuffed Mr. Henneberry and placed him into a patrol car. *Id.* at *3. After conducting an investigation, Officer Fredstrom concluded that he had probable cause to arrest Mr. Henneberry for trespass. *Id.* at *3.

The court, applying Ninth Circuit precedent, determined that while there was probable cause to arrest plaintiff, First Amendment retaliation claims against Becker and Officer Fredstrom could proceed to trial. *Id.* at *10-*11. The court noted that a reasonable trier of fact could conclude Becker triggered plaintiff's removal to prevent him from engaging in the type of speech he had previously engaged in at City Council meetings. *Id.* The court further concluded that Officer Fredstrom's decision to arrest Mr. Henneberry for trespassing instead of citing and releasing him, could allow a reasonable trier of fact to determine the arrest was in retaliation for his prior protected speech at City Council meetings. *Id.* at *12.

### D. *Cranford v. Kluttz*, 278 F. Supp. 3d 848 (M.D.N.C. 2017)

In *Cranford v. Kluttz*, 278 F. Supp. 3d 848 (M.D.N.C. 2017), plaintiff Brian D. Cranford, a Christian "street preacher" who traveled his local area professing his interpretation of the Bible on public streets, began preaching at the "Farmers Day Festival," a street fair featuring a farmer's market and other local vendors. *Id.* at 853. Local police Chief Eddie Kluttz reassigned Detective Reese Helms from general patrol duty and instructed him to observe Cranford, telling Detective Helms that "if

[plaintiff] violates any law, he should be arrested." Excerpts of Dep. of Reese Helms at 17, 20, *Cranford* v. *Kluttz*, No. 15-cv-00987 (M.D.N.C., Dec. 1, 2016), ECF No. 31-3. When Detective Helms told Cranford he could not preach on Festival grounds or pass out literature inside festival grounds because he had not registered for a vendor booth, Cranford stood near the boundary of the festival grounds, and preached to passersby, focusing on the topic that women who did not dress modestly were "whores and prostitutes." *Id.* at 853-854.

After Cranford's preaching precipitated a "contentious" conversation with a specific festivalgoer, Detective Helms approached Cranford and told him, "[y]ou're not gonna be disrespectful" and "don't start causing issue with the people. You can preach, but that has nothing to do with talking about people." *Id.* at 854. Detective Helms' instructions were evidently based on the North Carolina state statute prohibiting "[d]isorderly conduct," which included causing a public disturbance by "[m]ak[ing] or us[ing] any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation." N.C. Gen. Stat. § 14–288.4(a)(2); *Cranford*, 278 F. Supp. 3d at 856.

Cranford continued to preach that women should dress modestly, at times addressing his comments to specific festivalgoers and at one point gesturing to Detective Helms' wife and family, stating

> "All you ladies need to learn how to put on some clothes, too. I'm talkin' to her. I'm talkin' to your family members. And all of those ladies over there. The Bible says that a woman should dress modestly. See a lot of ladies out here dressed like tramps and

> whores and prostitutes today. The Bible says you dress modestly. Today all you ladies who's dressed half-nekkid out here." *Id.* at 854, 872.

Immediately before Cranford's arrest, he and Detective Helms had the following exchange:

> "Defendant Helms interrupted him, 'Sir, you cannot call people whores and prostitutes.' [Cranford] immediately responded, 'The Bible says it calls 'em whores and prostitutes.' Defendant Helms said, 'If you say that one more time, I'ma place you under arrest' and [Cranford] again immediately responded, 'You can't be whores and prostitutes, you can't be.'" *Id.* at 854 (internal citations omitted).

Cranford filed multiple claims relating to his arrest, including a claim for First Amendment retaliation. In considering other claims, the court found probable cause to confer qualified immunity on the defendants for a possible Fourth Amendment violation. *Id.* at 868-874. The court acknowledged that the statements that precipitated Cranford's arrest could have been general professions of his interpretation of Biblical principles, but it also found that it was reasonable to conclude that Cranford may have intended his statements to provoke specific individuals. *Id.* at 869-70. The court found that there had been probable cause to arrest because Cranford was ultimately convicted of disorderly conduct by a state court. *Id.* at 874-875.

The court then concluded that notwithstanding that it was "possible, at least theoretically, that Defendant Helms also acted in retaliation for [Cranford's] exercise of his First Amendment rights,"

Cranford could not state a claim against Detective Helms for retaliatory arrest due to the existence of probable cause. *Id.* at 874.

* * * * *

These cases—more could easily be cited—illustrate the wide range of circumstances in which First Amendment rights would be and sometimes already have been imperiled by a rule of law which bars retaliation claims so long as probable cause exists for an arrest to be made. Application of *Mount Healthy* would assure retaliatory arrest claims are analyzed under a long-applied test, which considers both the existence of probable cause and whether an arrest was motivated by animus to constitutionally protected speech. As a wide variety of speech is susceptible to suppression via arrests, a *per se* rule barring all First Amendment retaliation claims so long as probable cause for an arrest existed is constitutionally indefensible.

## II. *MOUNT HEALTHY* MUST BE APPLIED IN RETALIATORY ARREST CASES TO PERMIT VINDICATION OF CRITICAL FIRST AMENDMENT INTERESTS

The above cases also reveal that the framework articulated by this Court in *Mount Healthy*, which considers probable cause, but does not allow its existence, in and of itself, to defeat a retaliatory arrest claim, should be followed. The *Mount Healthy* framework, unlike that set forth in *Hartman*, allows the Court to make crucial inquiries into whether the communicative impact of protected speech impermissibly motivated an arrest. Courts cannot protect First Amendment rights using a mode of inquiry that does not permit them even to examine

whether protected speech was targeted based on its communicative impact.

### A. The First Amendment Does Not Permit Courts to Decide Retaliation Claims By Skirting The Essential Inquiry of Whether The Government Targeted Protected Speech Based on its Communicative Impact

The First Amendment demands that courts evaluating the substance of a claim of a First Amendment rights violation must at least inquire into whether state action (1) targets protected speech, and (2) whether that speech was targeted because of its communicative impact. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915-16 (1982) ("The fact that [a non-violent, politically motivated boycott] is constitutionally protected, however, imposes a special obligation on this Court to examine critically the basis on which liability was imposed."). Even where this Court has upheld restrictions on conduct that have secondary effects on speech, it has first, as a threshold matter, analyzed whether or not the application of the law targeted the communicative impact of the conduct. *See United States v. O'Brien*, 391 U.S. 367, 381–82 (1968) ("In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct . . . . For this noncommunicative impact of his conduct, and for nothing else, he was convicted.").

### 1. The *Mount Healthy* Framework Allows Courts to Determine Whether State Action Was Taken to Punish Protected Speech Because of its Communicative Impact

In circuits that apply the *Mount Healthy* framework in retaliatory arrest cases, courts may properly examine whether the officer targeted speech for its communicative impact. In these circuits, the existence of probable cause is considered as one element of the third *Mount Healthy* factor—not as a separate, dispositive element on its own. In ascertaining whether plaintiff's constitutionally protected activity (speech) motivated defendant's adverse action (arrest), the court evaluates whether the presence of probable cause was the but-for cause of the arrest, or if in reality, the arrest only occurred to retaliate against speech that is protected by the First Amendment. *See, e.g., Ford v. City of Yakima*. 706 F.3d 1188, 1193 (9th Cir. 2013). In both *Gullick* and in *Henneberry*, the courts employed this framework to conclude the First Amendment retaliation claims should proceed because of the very real possibility that plaintiffs suffered adverse action in truth not because of any offense they committed, but because they crossed paths with government officials who opposed their political beliefs. *Gullick*, 517 F. Supp. 2d at 1069; *Henneberry*, 2017 WL 1493006 at *11. In resolving on the merits of a claim that a government official retaliated against speech opposing him politically, the court must be able to consider whether the government targeted the speech because of its message. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (1978) ("Freedom of expression has particular significance with respect to government because it is here that the state has a special incentive

to repress opposition and often wields a more effective power of suppression.") (internal quotation marks omitted).

### 2. Focusing Only on The Existence of Probable Cause Does Not Allow Courts to Consider Whether a State Action Was Taken to Punish Protected Speech Because of its Communicative Impact

If the absence of probable cause is a separate element required to state a claim for retaliatory arrest against an individual officer, a court can dismiss a claim whatever the facts may be, without even addressing critical First Amendment principles. Once the court finds probable cause, the analysis ceases, and the First Amendment retaliation claim is defeated, without the court even looking at whether the plaintiff had engaged in speech deserving of constitutional protection, and whether the officer took action based on the message plaintiff conveyed.

*Greene* illustrates that if probable cause is a complete bar to a retaliatory arrest claim, the police are empowered with an unconstitutional authority to repress speech that criticizes or offends them. The plaintiff in *Greene* was arrested after he challenged the officer's baseless proposition that he had special power to punish words critical or offensive to him while inside of the police station. 310 F.3d at 892 ("You can't talk to me like that in my building."). As the First Amendment prevents a state legislature from providing the police with the power "to arrest individuals for words or conduct that annoy or offend them," *City of Hill v. Houston*, 482 U.S. 451, 465 (1987), an officer should not be able to seize this power indirectly by enforcing other permissible statutes in a First Amendment-retaliatory fashion. If

an officer does so, he must face a § 1983 claim. Otherwise, in plaintiff's preferred legal world, even if the officer in *Greene* had told the plaintiff that car storage fees could be waived only for confirmed Democrats, plaintiff's outburst at ridiculous viewpoint discrimination would constitute probable cause to arrest, and foreclose a First Amendment retaliation claim.

*Cranford* also well illustrates the dangers of requiring probable cause as a separate element of a retaliation claim, as it shows how an officer with arguable probable cause may shut down speech with which he disagrees. Although as the court discussed, certain of plaintiff's statements regarding women dressed as "whores and prostitutes" may have been directed as personal attacks on individual women present at the scene—thus creating probable cause to arrest under the relevant state statute prohibiting "words and conduct likely to provide ordinary men to violence"[7] the statements that provoked his arrest were much less clearly targeted at individuals. Indeed, it was arguably plaintiff's interpretation of biblical teachings that precipitated his arrest, as his statement "The Bible says it calls 'em whores and prostitutes" prompted Detective Helms to threaten arrest, and plaintiff's follow-up statement "You can't be whores and prostitutes, you can't be" finally elicited handcuffs. *Cranford*, 278 F. Supp. 3d at 854. Despite plaintiff's and other evidence in the record suggesting that Detective Helms and Chief Kluttz targeted Cranford for arrest based on their knowledge of his prior preaching, the court was not permitted to consider whether plaintiff was arrested in retaliation for expressing his religious views. *Id.* at 875-875. In the Fourth Circuit, once probable cause to arrest for any

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[7] N.C. Gen. Stat. § 14–288.4(a)(2).

reason is found, the court may inquire no further. That is precisely why a rule imposing the far more holistic *Mount Healthy* approach is needed.

### B. Granting Police Officers Unfettered Discretion to Punish Via Arrest Speech of Which They Do Not Approve Impermissibly Chills Speech

Petitioners forthrightly acknowledge that analyzing the existence of probable cause as a separate factor in First Amendment retaliation claims for arrests effectively gives officers free rein to retaliate against speech that consists of "challenges to the officers' authority, or simply personal insults." *See* Pet. Br. at 51. However, petitioners argue this consequence is acceptable because speech critical of police officers does not rank on the "highest rung of the hierarchy of First Amendment values," and arrests that shut down such speech are "unlikely to undermine the free exchange of ideas or '[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means.'" Pet. Br. at 51-52 (quoting *Lozman*, 138 S. Ct. at 1954-55, *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964); *Connick v. Myers*, 461 U.S. 138, 145 (1983). To the contrary, criticism of or challenges to the authority of government agents specifically tasked with law enforcement is critical to a democracy. As this Court has observed, "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston*, 482 U.S. at 462-63.

This vital speech criticizing agents of the state is inevitably chilled when citizens cannot be assured

that they will not be arrested for engaging in it. The decision to arrest is influenced by innumerable factors, beyond the simple question of whether the suspect may creditably be charged with having broken the law. Police cannot possibly arrest for every violation of the law that might merit it.[8] A great many laws, particularly statutes that regulate disorderly conduct and/or disturbing the public order as exemplified in *Cranford* and in *Greene*, or Alaska's statute prohibiting intoxication inside bars, could not realistically be enforced against every offender. Police have considerable discretion to decide when to arrest, even if they directly observe circumstances that create probable cause. *See, e.g, Cranford*, 278 F.Supp.3d at 854 (Detective Helms warning plaintiff to stop engaging in preaching directed at specific individuals in potential violation of the statute before actually deciding to arrest.). So too do police have considerable discretion in deciding whether to arrest, which immediately shuts down speech, or to instead issue a citation, which does not. *See, e.g., Henneberry*, 2017 WL 1493006 at *11 (considering officer's decision to arrest plaintiff rather than to issue a citation as evidence of retaliatory motive.).

While it is settled law that the Constitution permits police to exercise discretion in deciding whether or not to arrest, this latitude necessarily requires courts to assess whether a retaliatory arrest supported by probable cause was primarily motivated by retaliation for protected speech. A person who does not know when

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[8] And, as *Greene* well illustrates, those who have not broken the law may still be arrested—Mr. Greene was cleared on the charges of creating a disturbance. The very essence of probable cause is that officers are permitted to arrest on suspicion of, not confirmation of, illegal activity.

police may exercise discretion to arrest pursuant to innumerable statutes that are selectively enforced cannot be certain that her controversial speech will not suddenly trigger ultra-strict enforcement of an obscure traffic law or loitering statute. Absent a clearly established and enforced remedy via a retaliation claim, the uncertainty surrounding when an officer might actually arrest out of disagreement with the expressed views of the speaker could create the very uncertainty that causes citizens to "steer far wider of the unlawful zone. . ." *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

There is a significant risk that a citizen who has publicly challenged and criticized governmental authority will find himself unceremoniously arrested later, on a charge entirely unrelated to his speech. *See Gullick*, 517 F. Supp. 2d 1063; *Henneberry*, 2017 WL 1493006. It is far easier to cease one's controversial speech than it is to design one's life so that no police officer could ever suspect one of having committed a violation of any one of the innumerable laws imposed by our society. In petitioners' world, the risks of attending or participating in controversial protests would multiply. If, for example, a clash between pro-choice and pro-life activists sparked a riot, under petitioner's framework the police would be free to arrest only the pro-life activists when there was probable cause to do so. In fact, even if an officer acknowledged that she rounded up only pro-life protesters, an arrest would not be actionable so long as probable cause for a violation of law existed.

### C. No Other Government Power Can Be Deployed in Retaliation For Speech While Maintaining Immunity From a §1983 Claim.

In other circumstances where it is plain that a police officer or other government official took

adverse action due to an outspoken citizen's protected speech, a First Amendment retaliation claim may follow. *See, e.g., Linnemann v. City of Aberdeen,* 2013 WL 3233526, *7 (D. Md. June 25, 2013) (First Amendment retaliation claim sustained where officer threw anti-abortion signs into the middle of the street); *Richter v. Maryland,* 590 F. Supp. 2d 730, 734 (D. Md. 2008) *aff'd sub nom, Richter v. Beatty,* 417 F. App'x 308 (4th Cir.2011) (First Amendment retaliation claim sustained where person of ordinary fitness would likely "refrain from putting political speech on their cars if they thought that they would suffer immediate retaliation in the form of a repair order" issued by police); *Dorr v. Weber,* 741 F. Supp. 2d 1010, 1020 (N.D. Iowa 2010) (First Amendment retaliation claim sustained where the sheriff denied renewal of his concealed carry permit due to his political advocacy activities, including passing out flyers for an organization that advocated shrinking the budget of the county government, including the sheriff's office). In fact, no other government official may take adverse action against a person who has insulted a police officer. *See J.G. Ex Rel. K.C. V. Hackettstown Public School District,* No. 8-cv-2365 (PGS)(DEA) (D.N.J., August 8, 2018) (student could proceed with retaliation claim where school suspended her after referring to a fictional police officer in reading material for English class as a "pig.").

Because government officials cannot generally wield any discretionary power with absolute immunity from retaliation claims, most government officials must persistently carry out government functions even in the face of speech with which they disagree. Unlike the officer in *Greene,* most government officials cannot terminate an interaction with a person they find irritating, disrespectful, or disagreeable

through a swift exercise of the arrest power. Nor can governmental officials use any discretionary power as a sword in a debate on important social and political issues. The rule sought by petitioners would allow the arrest power to be used in precisely this fashion. In *Cranford*, some of plaintiff's preaching against women dressing as "whores and prostitutes" was directed specifically at Detective Helms wife. *Cranford*, 278 F.Supp.3d at 872 ("plaintiff pointed in the direction of [Helms'] wife, who was sitting next to him, and said 'I'm talking to you and your family.'"). Detective Helms testified that this particular part of plaintiff's speech nearly provoked him to violence, in support of his argument that there was probable cause to arrest plaintiff for breach of the peace. *Id.*at 872 n.8. Had Detective Helms retaliated violently, this would have plainly violated plaintiff's First Amendment rights. But he did not retaliate violently, because as the court observed, Detective Helms was able to respond in a way "not available to the civilian spectators" by forcibly placing plaintiff under arrest, shutting down the articulation of religious views with which he did not agree. *Id.* Because there was probable cause, Helms could not face a First Amendment retaliation claim—even though he continued to verbally spar with plaintiff after he said the words that created probable cause, and even though there was evidence in the record that Detective Helms and Chief Kluttz targeted plaintiff for arrest based on their knowledge of his prior preaching.

This Court should not countenance the establishment of a legal framework that gives police officers the ultimate trump card in a dispute with a person who has an opposing viewpoint ranging from religious or political views to a simple desire to protest concerning any of society's innumerable problems. The check of

a First Amendment retaliation claim must be available, even in situations where there is probable cause to arrest.

## CONCLUSION

For the reasons stated above, this Court should reject any mode of analysis for First Amendment retaliatory arrest claims that permits official conduct to go unchecked that is rooted in a desire to retaliate against protected speech. If the presence of probable cause alone defeats the existence of a First Amendment retaliatory arrest claim under all circumstances, arrests rooted in an effort to stifle protected speech will be judicially unscrutinized and undisturbed. Such a result risks impairing public confidence in both law enforcement and the judiciary. At the same time, it is irreconcilable with this Court's duty to protect First Amendment rights.

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Respectfully submitted,

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